

STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

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SECRETARY OF STATE

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
DESIGN DEVELOPMENT, LLC)	
)	
)	CASE #WPC07-0216
)	
RESPONDENT)	DOCKET #04.30-098832A

AGREED ORDER

This matter came to be heard before the Tennessee Water Quality Control Board upon the Commissioner's Order and Assessment of Civil Penalty and the Respondent's Petition for Appeal. The Board, a quorum present, hereby adopts the following Findings of Fact, Conclusions of Law, Order and Assessments to which the parties have agreed, as evidenced by their signatures below.

PARTIES

I.

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the "director" and the "division" respectively) by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "commissioner" and the "department" respectively).

II.

Design Development LLC, (hereinafter the "Respondent") is the owner of a residential development located on Shag Rag road in Putnam County, Tennessee

(hereinafter the "site"). Service of process may be made on the Respondent through James F. McKinnie, Registered Agent, at 5712 Boatman Lane, Cookeville, Tennessee, 38506.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the "Act"), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the "Rule"). Pursuant to T.C.A. §69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a "person" as defined at T.C.A. §69-3-103(20) and, as hereinafter stated, the Respondent has violated the Act.

V.

Bear Creek and its unnamed tributaries and unnamed wetlands are referred to herein, as "waters of the state" as defined by T.C.A. § 69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. In accordance with Department Rule 1200-4-4, "Use Classifications for Surface Waters," Bear Creek and its unnamed tributaries and unnamed wetlands have been classified for the following uses: Fish and Aquatic Life, Recreation, Irrigation, and Livestock Watering and Wildlife.

VI.

Tennessee Code Annotated §69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substances will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the "TNCGP") may be obtained by submittal of a Notice of Intent (NOI), site-specific Storm Water Pollution Prevention Plan (SWPPP), and appropriate fee.

Pursuant to T.C.A. §69-3-108, Rule 1200-4-7-.04 requires a person to submit an application prior to engaging in any activity that requires an Aquatic Resource Alteration Permit (ARAP) that is not governed by a general permit or a §401 Water Quality Certification. No activity may be authorized unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value.

FINDINGS OF FACT

VII.

On March 2, 2007, the Respondent submitted a NOI, SWPPP, and application fee to the Cookeville Environmental Field office (CK-EFO), requesting coverage under the TNCGP for construction activities at the site. The division issued coverage on April 10, 2007.

VIII.

On May 21, 2007, division personnel from the CK-EFO conducted a complaint investigation at the site and observed that Erosion Prevention and Sediment Control (EPSC) measures were inadequate, not in accordance with the SWPPP, and that equipment had been operating in the unnamed tributary of Bear Creek. In addition, division personnel observed unauthorized alterations to a wetlands area that the SWPPP specified would be left intact, and that sediment had migrated into the unnamed tributary of Bear Creek.

IX.

On May 25, 2007, the division issued a Notice of Violation (NOV) for the violations observed during the May 21, 2007, site visit.

X.

On June 8, 2007, the respondent submitted an ARAP application to the CK-EFO requesting written authorization under the General Permit for Construction and Removal

of Minor Road Crossings (GP-MR). The division issued written authorization for this activity on June 12, 2007.

XI.

On August 1, 2007, the division issued correspondence confirming the findings of a wetland delineation report conducted at the site by Mr. Ken Morgan. Construction activity had previously occurred in one of the wetland areas identified in the report. This correspondence also instructed the Respondent to install EPSC measures to protect the identified wetlands and to obtain an ARAP prior to wetland alterations.

XII.

On August 27 and August 28, 2007, division personnel conducted a complaint investigation at the site. Division personnel noted that an unauthorized stream alteration had occurred, and that EPSC measures at the road crossing covered by ARAP #NR0707.107 were inadequate and in need of maintenance. At the north side of the site personnel observed sediment loss off site at Candyland Drive.

XIII.

On September 4, 2007, the division issued a NOV for violations cited during the August 27-28, 2007, site visit.

XIV.

On October 22, 2007, the Division issued Director's Order WPC #07-0216 to the Respondent. A civil penalty of \$15,000 was assessed, of which \$4,000 was upfront. A timely appeal was received by the Division on November 9, 2008.

XV.

On January 8, 2008 division personnel from the CK-EFO conducted a follow-up investigation at the site and observed that Erosion Prevention and Sediment Control (EPSC) measures remained inadequate, and that sediment loss continued onto Candyland Drive.

XVI.

On January 10, 2008, the division issued a Notice of Violation (NOV) for the violations observed during the January 8, 2008 site visit.

XVII.

On January 30, 2008, a show cause meeting was held with the Respondent and his representatives, and representatives of the Division. The Respondent's representatives did provide some evidence and/or documentation that might mitigate, but did not prevent, continued enforcement action against the Respondent

XVIII.

On March 27, 2008 division personnel from the CK-EFO conducted a follow-up investigation at the site and observed there were still inadequate controls onsite and the controls installed are in need of some maintenance. The site still needed permanent stabilization.

XIX.

The Respondent, Mr. Tom Sergio, attended and passed an EPSC Level I Certification Program on May 16, 2008. This was not required by the Director's Order in

this case. He is also working on both presenting and having someone from the local TDEC office speak to the Putnam Count Homebuilders Association about similar issues they may face.

XX.

In early June 2008, division personnel from the CK-EFO conducted two follow-up investigations at the site and observed that all violations had been corrected and all EPSC measures were adequate and performing as expected.

VIOLATIONS

XXI.

By physically altering waters of the state without authorization under an ARAP, failing to comply with the terms of an ARAP and by failing to comply with terms and conditions of the TNCGP as described herein, the Respondent has violated T.C.A. §§69-3-108(a) and (b) and 69-3-114(b), which state:

T.C.A. §69-3-108:

- (a) Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.
- (a) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

(1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;

(4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;

(6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters;

T.C.A. § 69-3-114 (b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in § 69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the Commissioner under this part.

ORDER AND ASSESSMENT

XXII.

WHEREFORE, PREMISES CONSIDERED, the Board hereby ORDERS and AGREES that:

1. The Respondent shall continue to implement and maintain appropriate EPSC measures to ensure that no eroded material leaves the site and enters waters of the state until final site stabilization.

2. The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

3. The Respondent is hereby assessed a reduced CIVIL PENALTY in the amount of THREE THOUSAND DOLLARS (\$3,000.00), which shall be paid to the Department within thirty (30) days from the receipt of this Agreed Order.

4. Payment of the civil penalty shall be made to "Treasurer, State of Tennessee" and shall be sent to the Division of Fiscal Services, Consolidated Fees Section, Tennessee Department of Environment and Conservation, 14th Floor L & C Annex, 401 Church Street, Nashville, TN 37243. The case number, **WPC07-0216** should be included on or with the payment.

REASONS FOR DECISION

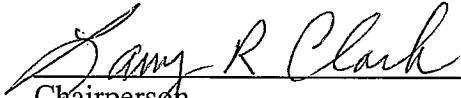
The above Findings of Facts and Conclusions of Law and the Orders were made in an effort to provide a coordinated system of control and management under the Tennessee Water Quality Control Act. The Board encourages settling cases in the interest of avoiding the time and expense of prolonged litigation.


Adopted and approved by a majority of the Board, a quorum being present, on this

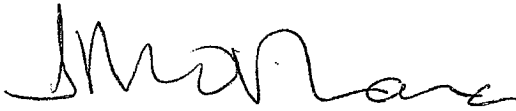
17th day of June, 2008.

APPROVED FOR ENTRY

FOR THE TENNESSEE WATER QUALITY CONTROL BOARD:


Chairperson


David L. Henry
Assistant General Counsel
Tennessee Department of Environment & Conservation


T. Michael O'Mara BPR # 063338
O'Mara & Johnson, PLLC
317 West Spring Street
Cookeville, TN 38501

Attorney for the Respondent

RIGHTS OF APPEAL

The Respondent is hereby notified and advised of the right to administrative and judicial review of this AGREED ORDER pursuant to the Tennessee Uniform Administrative Procedures Act, T.C.A. §§ 4-5-316, 4-5-317 and 4-5-322 and the Water Quality Control Act, T.C.A. §§ 69-3-111 and 69-3-115.

T.C.A. § 4-5-316 gives a party the right to submit to the Board a Petition for Stay of Effectiveness of a Final Order within seven (7) days after its entry. T.C.A. § 4-5-317 gives any party the right to file a Petition for Reconsideration within ten (10) days after the entry of a Final Order, stating specific grounds upon which relief is requested.

T.C.A. § 4-5-322 and 69-3-111 provide the right of judicial review by filing a Petition in the Chancery Court of Davidson County within sixty (60) days of entry of this Order.

By entering into this Agreed Order, the Respondents knowingly and voluntarily waive their rights to appeal, as described in the RIGHTS OF APPEAL section, listed above.

Entered in the Office of the Secretary of State, Administrative Procedures

Division this 18th day of June, 2008.

Thomas G. Stovall

Thomas G. Stovall, ~~Director~~
Administrative Procedures Division

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